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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

15 CR 588 (ER)

5 AHMED MOHAMMED EL GAMMAL,

6 Defendant.

7 -----x

8 New York, N.Y.
9 December 19, 2016
3:00 p.m.

10 Before:

11 HON. EDGARDO RAMOS,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA

United States Attorney for the
Southern District of New York

16 BRENDAN F. QUIGLEY

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19 FEDERAL DEFENDERS OF NEW YORK

Attorneys for Defendant

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22 DANIEL G. HABIB

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1 THE DEPUTY CLERK: In the matter of the United States
2 of America v. El Gammal, counsel, please state your name for
3 the record.

4 MR. QUIGLEY: Good afternoon, your Honor. Brendan
5 Quigley and Negar Tekeei for the United States.

6 THE COURT: Good afternoon.

7 MS. SHROFF: Good afternoon, your Honor. On behalf of
8 Mr. El Gammal, Federal Defenders of New York by Sabrina Shroff,
9 Annalisa Miron, and Daniel Habib. Good afternoon.

10 THE COURT: Good afternoon to you. And good afternoon
11 to you, Mr. El Gammal.

12 THE DEFENDANT: Good afternoon.

13 THE COURT: We are here at the request of the
14 defendant following a flurry of letters that I received
15 concerning primarily, although perhaps not exclusively, a
16 request that the protective order that has been entered into in
17 this case be modified to declassify certain categories of
18 documents, which presumably will assist Mr. Gammal in his
19 preparation for trial, and which documents apparently are
20 already in the public realm, either because of their nature,
21 having been created on social media, or because of the use of
22 the government in connection of those documents in connection
23 with this case.

24 I do note we are scheduled for trial on January 9, so
25 we are some small number of weeks away, and we'll he deal with

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1 this issue and then I do have a decision for you on some of the
2 motions in limine.

3 So let me turn to the defense in the first instance.
4 How are you being prevented or burdened in your preparation for
5 trial as a result of the protective order currently in place?

6 MS. SHROFF: Your Honor, but that's simply not the
7 standard, and the government knows that. The government knows
8 full well that's not the standard. The government knows full
9 well the burden is upon them to mark documents that are
10 confidential as confidential. They know all of this. That's
11 why they didn't address it in their motion papers.

12 It is not my burden to show. I don't have to be
13 prejudiced, I don't have to be burdened, it doesn't have to be
14 cumbersome for me.

15 Bottom line is this: If you want to put certain
16 documents under a confidential designation, they have to show
17 that in fact they're confidential. And if you want me to
18 assume the government's burden, which is rightly theirs, I can
19 explain to the Court specifically ex parte why it is
20 burdensome. But the one issue I do have with the government's
21 response I want to lay out very clearly.

22 The government's letter implies that most of their
23 witnesses at trial will be non-fact witnesses, and they have in
24 fact been studious and careful in how they have used this
25 discovery. Which witnesses the government puts on is not the

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1 inquiry. The inquiry is which witnesses have they talked to.
2 So they have talked to plenty. And if they don't want to come
3 clean as to which fact witnesses they've talked to, that's a
4 conversation the Court should have with them.

5 THE COURT: I'm sorry. These two issues overlap. The
6 issue of --

7 MS. SHROFF: They overlap because they get to use
8 these documents to prepare their case, they don't have to write
9 to you, they don't have to seek your permission. They get to
10 mark something confidential and use it in a non-confidential
11 way.

12 Let's take a simple example. Are they suggesting they
13 haven't talked to Samy El-Goarany. The father, mother,
14 brother, second brother? Of course they've talked to them.
15 Did they talk to them without having access to all of these
16 documents that they marked as confidential? I don't think so.
17 But you know what? They're right here. Ask them. They've
18 interviewed all of these people. They've gone over the
19 Facebook posts, they've gone over the language. Their 3500
20 makes clear that they've done so with Tarek El-Goarany. I
21 don't understand.

22 THE COURT: You're saying that the fact that the
23 government, irrespective of who they may call at trial, the
24 fact that the government has reviewed with fact witnesses
25 documents that have been marked confidential would require me

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1 to direct them to recategorize those documents at this point?

2 MS. SHROFF: They should rightly be recategorized
3 anyway. If I was to say, if you were to hold them to their
4 burden as only marking those Facebook chats, Facebook posts
5 from 2013, 2014, 2009, YouTube videos, they are not
6 confidential.

7 And there is no method or means. It is ridiculous for
8 the government to argue that somehow or the other if these
9 documents become public ISIS is going to find out what
10 mechanism the United States government knows. They know that
11 that's not a good argument for them. Their own discovery
12 production in other cases have included Inspire Magazine which
13 clearly set out that ISIS knows far more than anything this
14 case could possibly give them.

15 Is it really the government's position that ISIS does
16 not know that the United States uses a search warrant? Or that
17 they have instruments for their use, including all of these
18 different mechanisms by which they can go get documents? Are
19 they really saying that ISIS does not know that Twitter is
20 used, Facebook is used, that all of these social media posts
21 are used? ISIS uses them, they know.

22 I don't understand what method are they going to
23 disclose if we are able to share these posts with a fact
24 witness.

25 THE COURT: Ms. Shroff, you and I know that when we

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1 start talking about what the government classifies as national
2 security or confidential for one reason or another is
3 contextual, and sometimes what is classified in one fashion and
4 one instance is classified in some other fashion and some other
5 instance.

6 MS. SHROFF: But --

7 THE COURT: And these prosecutors are required, I
8 assume, to follow those regulations. So let's talk about --

9 MS. SHROFF: No, no, we're not talking about
10 classified. Classified is a whole different category. I'm not
11 even touching classified. I am happy to draw that line.
12 Classified they can go talk about national security all they
13 want. These are simply documents that they have marked
14 confidential. They want you to muddy up classified and
15 confidential. I'm not talking about classified at all. That's
16 sitting in their CIPA room, that's in the SCIF, I'm not
17 touching that. To have any discussion I would have to be in
18 that robing room with cleared counsel.

19 I'm simply talking, I want to be very clear, because
20 they obfuscate on this point as well in their response. I'm
21 only talking about documents they marked confidential. They
22 are Facebook posts, 2009, 2010, '11, '12, '13, '14, '15, he has
23 been in jail for 15 months. Okay. There is nothing recent,
24 there is no investigation pending. All of the fact witnesses
25 in this case they have spoken to. They know every single

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1 person they know, they have talked to them.

2 Their letter is quite nicely written in the sense when
3 it lastly says only those individuals who are party to these
4 conversations are going to be their witnesses at trial. That
5 isn't the question. They have been able to use these documents
6 to prepare. That's all I'm asking for.

7 THE COURT: I want to make sure we're talking based on
8 actual facts here. Obviously I don't have the 3500 material.
9 I assume that you're referring to the 3500 material.

10 MS. SHROFF: No. They're right here. Just ask
11 them -- yeah, I have 3500 for one person, and that, too, has
12 not been updated. I've been asking for days to update it.
13 They haven't updated.

14 The government is right here. They can simply be
15 asked, hey, by the way, sir, have you spoken to Mr. El-Goarany
16 the dad, El-Goarany the mom, brother Khalid, cousin Emmett.
17 They're right here. Ask them.

18 THE COURT: Well, I don't know that I need to do that.
19 But I'm trying to figure out, you're saying that based on your
20 review of the certain 3500 materials it is clear that the
21 government has been using these confidential documents in their
22 conversations with these fact witnesses.

23 MS. SHROFF: Yes.

24 THE COURT: And that is the basis for the motion?

25 MS. SHROFF: No. My basis for the motion is that

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1 these documents should never have been marked confidential. It
2 is their burden to show that they should be confidential, that
3 they should remain confidential. The government knows they are
4 not confidential. That is why they keep making this argument
5 that we signed the protective order and we've been able to make
6 do for 15 months so we should make do for a month more.
7 Knowing full well we did not agree to this, that we tried to
8 argue, and initially we lost. We lost the motion to modify the
9 protective order to include fact witnesses and here we are
10 again.

11 And we think we have a stronger argument now. We have
12 a stronger argument now because perhaps we've been more
13 articulate in later cases, and judges have noticed that they're
14 over-designating, so they've said to them stop. Stop
15 over-designating. Narrow the volume, narrow the group of
16 documents to which those that are truly confidential, or
17 modify. They can do either. Right. But what they can't do is
18 say I get to use it, I've marked them in an overbroad manner,
19 you don't get to use them, and that's the law. That's not
20 right.

21 THE COURT: I guess I'll hear you ex parte on how, if
22 at all, you've been burdened by the designations.

23 MS. SHROFF: Okay.

24 THE COURT: But I guess I'm trying to figure out --

25 MS. SHROFF: It is a very simple question. If he gets

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1 to do it, why not me. If he gets to talk to a witness and use
2 all of the information in a Facebook post, why not me.

3 THE COURT: That's the question. Have you been
4 prevented from speaking with fact witnesses and not allowed to
5 use these documents?

6 MS. SHROFF: Yeah, we have. We have to keep coming to
7 you each time. We have to keep coming to you, and they don't.
8 It is the same exact document, and the document is publicly
9 available. It is a Facebook post.

10 THE COURT: And on those occasions that you have made
11 application to me, I believe I've granted you --

12 MS. SHROFF: That's not --

13 THE COURT: -- the authority to use it on each
14 occasion, correct?

15 MS. SHROFF: No, that's not the point. The point
16 isn't that. The point is they have no such restriction and why
17 should -- why are they in a better position to prepare for
18 trial than I am. Why?

19 THE COURT: Okay.

20 MS. SHROFF: Right? They know full well that the
21 burden is theirs. Right. They've litigated this over and over
22 again. They just litigated it in front of Judge Berman and
23 they lost. This exact same United States attorney's office
24 litigated this before Judge Berman, and Judge Berman said you,
25 no, this universe is far too broad. So go back, and narrow the

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1 universe. Meet and confer. And we met and conferred once, we
2 met and conferred twice, we met and conferred three times, and
3 they reduced and they shrunk and they shrunk which documents
4 they would be categorizing as confidential. Finally, even
5 after that, Judge Berman ordered them to undertake a review
6 every four months to make sure the documents that were
7 confidential a month ago still need to be confidential today.

8 We're not asking them to undertake that burden right
9 now. All we are saying is let us talk to our fact witnesses.
10 We're less than a month away from trial now. We are not asking
11 you to let us send copies. Do you know how burdensome it is to
12 sit there and read discovery out loud to people in an effort to
13 discuss it with them? It's absurd. They don't have to do
14 that. They take the document and they say, hey, here, take a
15 look and we'll call you. They're not stopped from doing it.

16 THE COURT: Okay. Let me hear from Mr. Quigley or
17 Ms. Tekeei.

18 MR. QUIGLEY: Your Honor, our position is pretty set
19 out in our papers. We are happy to lift, recognizing trial is
20 coming up, we're happy to lift the protective order with
21 respect to the majority of the documents on our October 3, 2016
22 exhibit list, just because, given the likelihood of trial and
23 the likelihood those will become part of the public record, and
24 frankly, the fact that those are the key documents in the case,
25 we're happy to do that.

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1 To the extent there are additional documents that the
2 defense wants to discuss lifting a protective order for, we're
3 happy to do that as well.

4 I think the fact is, though, requiring us to do a
5 wholesale review of hundreds of thousands of pages of discovery
6 at this point, three weeks before trial, would be extremely
7 burdensome and, frankly, it's not the standard. The government
8 does not need to demonstrate good cause on a
9 document-by-document basis. The *Smith* case, which both parties
10 cited in their brief, talks about that. And again, and this
11 was a protective order that was stipulated to a year ago. If
12 there are specific documents during the course of the
13 litigation they wanted to discuss, we would be happy to discuss
14 those. As your Honor stated, there is a mechanism for them to
15 show those to fact witnesses and they have taken advantage of
16 that.

17 THE COURT: Can they under the protective order show
18 them the documents?

19 MR. QUIGLEY: Yes, your Honor.

20 THE COURT: They don't have to read them the
21 documents?

22 MR. QUIGLEY: That's not my view of the protective
23 order, no.

24 THE COURT: But it seems, Mr. Quigley, that there
25 would appear to be one or more categories of documents that

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1 Ms. Shroff has mentioned that from a common sensical point of
2 view would be prone to reclassification.

3 MR. QUIGLEY: Your Honor, I hear what you are saying.
4 I disagree with her characterization of a lot of the social
5 media evidence in this case though. It is not actually
6 publicly available. You know, the Facebook -- the documents we
7 get from Facebook and Twitter include some publicly available
8 posts, like the things that a person puts on their wall and
9 their Tweets. But they also, and frankly, this is the majority
10 of what we received from Facebook, concern private messages
11 between different people, and same with Twitter as direct
12 messages between different people. Those are not publicly
13 available documents by any means.

14 THE COURT: Have the publicly available documents been
15 reclassified or are they still under the same categorization?

16 MR. QUIGLEY: Your Honor, I don't know what's
17 publicly -- I can tell you as a kind of a general matter, I am
18 aware that certain Facebook and Twitter content is generally
19 available to the public. It may have been available to the
20 public when we served the search warrant back in 2014 or 2015,
21 but that doesn't mean that it's still publicly available. That
22 the person's Twitter page is still up or their Facebook page is
23 still up. The answer to that is no, but what was publicly
24 available at the time of the search warrant was obtained is not
25 necessarily what's publicly available now.

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1 THE COURT: Yes, but I guess, does its nature change
2 so much that we ought not to treat it differently because it's
3 been taken down for whatever reason? If it was publicly
4 available once upon a time, what's the harm now?

5 MR. QUIGLEY: Your Honor, I think the issue there
6 would be that I could see it shows who the government viewed as
7 a subject in this investigation, who the government obtained
8 process on, and I think that would -- while the defense
9 certainly has a right to that information in terms of the
10 discovery, I do think making publicly available the
11 government's -- kind of the way the government went about this
12 investigation and different people it investigated could
13 raise -- it would raise law enforcement sensitivities down the
14 line.

15 THE COURT: What we're talking about is Facebook posts
16 of individuals other than Mr. El Gammal or the young man that
17 allegedly traveled to Syria and the individual in Turkey?

18 MR. QUIGLEY: In some cases, yes, your Honor. I'd say
19 even with respect to the shared content and publicly available
20 content, that's still going to require a significant review by
21 the government at this stage. Some of these Facebook returns
22 which were produced again in September, majority of them in
23 September 2015, well over a year ago are over -- close to
24 100,000 pages long. Going through that, figuring out, oh, this
25 is in the shared content, this is in the direct messages so

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1 this is public, this isn't. It will still require hours and
2 hours of review.

3 THE COURT: It sounded like you mentioned at the
4 outset that you were open to engaging in conversations with the
5 defense concerning particular documents or particular
6 categories of documents that you would be willing to reconsider
7 reclassifying. Is that right? And if so, have those
8 conversations already taken place or not?

9 MR. QUIGLEY: Your Honor, there has been some. I
10 think not at the level of granularity and particularity that
11 really would make for a more productive conversation. We've
12 had conversations, "Are you going to lift protective order?"
13 "No." "Okay." But if it's "Are you going to lift the
14 protective order with respect to some portion of one of these
15 Facebook returns," or even "Can we show a portion of this
16 Facebook return to fact witnesses," that would be fine with us.

17 THE COURT: I can give them leave to do that, right?

18 MR. QUIGLEY: Yes, your Honor. That procedure has
19 been employed in this case by defense and it seems to have
20 worked.

21 THE COURT: Ms. Shroff.

22 MS. SHROFF: Let me understand what Mr. Quigley is
23 saying to the Court. Mr. Quigley is saying that whereas for
24 good cause shown, that clause in the protective order means
25 nothing to him. He doesn't have to undertake review to make

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1 sure there is good cause for these documents to be marked
2 confidential. He doesn't have to go through them. He just has
3 to take a lump big category of documents and say I think
4 they're confidential, boohoo. Nobody's reviewing these. If we
5 come back to you, that's just delay. And you know what? I get
6 to use them. You don't. But whereas for good cause shown,
7 that phrase should mean absolutely nothing. That's one of his
8 arguments.

9 Because, essentially, the government has marked every
10 Facebook return from every individual, including individuals
11 they have mentioned by name in their motion practice, not us,
12 they did. Right. Their press release, the articles on their
13 motions revealed Samy El-Goarany's name. Not ours, theirs.

14 Essentially they're still saying to us go back and
15 look at our very tentative exhibit list, and only those
16 documents that we think should come out at trial are those
17 documents that we are willing to mark as non-confidential.
18 Regardless of the fact that those documents, when made
19 non-confidential, would reveal who the person being spoken to
20 is, whether it's Samy El-Goarany, Tarek, Emmett, Mamoud,
21 whoever. Right. All of these people are known, they're
22 publicly known people. They have spoken to them.

23 Their investigation is over. There is not a single
24 law enforcement personnel still working on any person who is
25 being investigated in this case. It's finished. The fact that

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1 they use search warrants to investigate this case, they made
2 that public.

3 All this Court has to do is to designate publicly
4 available documents, all of the documents, the entire universe
5 of documents in this case consist of nothing but Facebook
6 posts. Okay. There is nothing other than Facebook and
7 Twitter. And for the government to sit here and say somehow
8 that the Twitter exchanges between two people is somehow
9 confidential, there's no rhyme or reason they've given. Right.
10 Their position basically is take my word for it, Judge Ramos,
11 two people talking on Twitter, it's confidential. I can use
12 it, but not you. I've used it in fact. I have reviewed those
13 very Twitter exchanges that I'm telling you, defense, you can't
14 use, I have actually used them to talk to at least six or seven
15 fact witnesses that I'm now not going to call. Right. That's
16 all preparation for trial.

17 And I don't know why Mr. Quigley keeps saying we
18 agreed to it. If you want to order the transcript,
19 Mr. Quigley, we shall, we shall undertake it, we objected to
20 the very phrase that we are still fighting about 15 months
21 later. And for those 15 months, they have been using them as
22 they see fit. If the government could have an ex parte
23 conversation with the Court, we would not object.

24 Let them tell you who else they are investigating at
25 this point. Are they still investigating somebody 15 months

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1 later?

2 MR. QUIGLEY: Judge, if I may.

3 THE COURT: Sure.

4 MR. QUIGLEY: Judge, I take very strong exception to
5 the insinuation that we've been less than careful with these
6 documents.

7 MS. SHROFF: It is not an insinuation.

8 MR. QUIGLEY: Or showing these documents to different
9 fact witnesses. Ms. Shroff has no idea who the government has
10 not shown these documents to.

11 There was one public filing where we did inadvertently
12 mention CC-1's name. His name has not appeared in any press
13 release, it hasn't appeared in any complaint, it hasn't
14 appeared in any forum before that one document that was
15 recently filed in motions in limine.

16 The fact is we're not in the habit of showing fact
17 witnesses documents before trial preparation. We certainly
18 don't show fact witnesses other people's communications. So to
19 say we've shown this to six or seven fact witnesses is
20 completely incorrect, and I don't know how Ms. Shroff would
21 have any way of knowing that.

22 THE COURT: That's what I was trying to figure out.
23 That's why I asked her about the 3500 materials.

24 MS. SHROFF: But it is a simple question. The
25 government can just tell you which fact witnesses they've

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1 talked to. They're right here.

2 THE COURT: I guess I just assumed that because you
3 were making this argument, you had some basis.

4 MS. SHROFF: I do. And I'm happy to share how. But I
5 think the government is right here. They could just easily
6 stand up and say, you know what, I haven't talked to Nico.
7 Have they? We're right here. Any answer would do. Andres,
8 how about Andres? Have you spoken to Andres?

9 MR. QUIGLEY: Judge, obviously --

10 THE COURT: Why don't parties address themselves to
11 me.

12 Let me ask you, Mr. Quigley, do you or do you not have
13 to show good cause as to why the documents should continue to
14 be designated?

15 MR. QUIGLEY: Your Honor, I think that's not the
16 standard for modification of a protective order. The standard
17 is good cause in the first instance. We established good
18 cause. And I think in deciding whether a protective order
19 should be modified, the Court can consider, among other things,
20 the parties' reliance on the protective order throughout the
21 course of the litigation, and the fact that this is -- and the
22 burden on the party from modifying a protective order at this
23 stage, three weeks before trial.

24 MS. SHROFF: He should not bear the burden three weeks
25 before trial but we should.

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1 It's very clear, your Honor, this is extremely clear,
2 the protective order says whereas for good cause shown, and
3 recently -- they know this. They know this, they know that the
4 waiver argument doesn't work because in front of Judge Berman
5 on *United States v. Rahimi*, 16 CR 760, that very argument was
6 rejected. Judge Berman clearly said, clearly noted, clearly,
7 clearly noted, that it is an ongoing burden upon the government
8 to continue to show that only those documents that truly need
9 to be marked confidential are marked confidential. And again,
10 we did not consent to this protective order.

11 THE COURT: I'm sorry?

12 MS. SHROFF: We argued about it being overly
13 burdensome, overly broad, and at that point we lost.

14 THE COURT: Well, I don't want to put too fine a point
15 on it, but the protective order is designated as a stipulated
16 protective order. It is agreed and consented to by yourself
17 and Ms. Miron on behalf of Mr. Gammal, and is signed on
18 September 16, 2015.

19 MS. SHROFF: And we had an oral argument, your Honor.
20 If you want, I can pull up the transcript. We had an oral
21 argument, we argued about this. The Court overruled us over
22 objection. We then stated on the record we were signing it so
23 we could get the discovery. And then the Court said you would
24 hear us ex parte, and the Court also said that if we had to
25 approach you ex parte and you decided you could not respond to

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1 us ex parte, you would then give us the option of withdrawing
2 the application.

3 But really, if the government is solely relying on
4 consent, we withdraw consent.

5 THE COURT: Okay. I'll see you in the robing room,
6 the defense.

7 (Pages 21-40 sealed)

8 (Continued on next page)

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1 (In open court)

2 THE COURT: Here's where I am, having spoken now with
3 both sides ex parte.

4 I will amend the stipulated protective order, and I'll
5 allow Mr. El Gammal's attorneys, subject to filing appropriate
6 certifications which I'll leave up to the defense in the first
7 instance to propose, and I would ask you to share it with the
8 government to see whether they could be consented to in that
9 regard. That going forward the defense will not be required to
10 come to the Court in every instance where they wish to show or
11 to share documents that have been designated confidential under
12 the protective order to potential witnesses, that they would be
13 free to do so in each case where they have a good faith basis
14 to believe that the individual can be useful to the preparation
15 of Mr. El Gammal's defense or there is potential they may be
16 called by the defense as a fact witness.

17 However, one category of documents will be subject to
18 the current restrictions, and those are any sealed court
19 filings, including sealed search warrant applications.

20 With respect to the 3500 materials, I'll allow the
21 defense to use those materials as well, with the caveat that
22 the witness not be told that that material has been prepared by
23 law enforcement.

24 So I will expect the proposed certifications from the
25 defense, hopefully on consent, but if not, I will make a

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1 determination as to what the appropriate content should be. So
2 I think that takes care of that issue.

3 Now as I indicated, I do have some decisions for you
4 concerning some of the pending motions in limine, beginning
5 with government's October 17 motion.

6 There is a motion concerning preventing the defense
7 from referencing how FISA materials were obtained. I will
8 withhold judgment until the FISA motion is decided.

9 With respect to the government's motion concerning
10 CC-1's statements to relatives and others concerning his
11 support for ISIL, government seeks to offer at trial various
12 communications that CC-1 had regarding his activities in ISIL
13 controlled territory. The government identifies four specific
14 communications, and seeks to offer those communications as well
15 as similar communications at trial. To the extent that the
16 government seeks to introduce additional communications,
17 defendant indicates he will object as appropriate.

18 The specific communications, the four specific are
19 CC-1's February 16, 2016, messages to an individual identified
20 as Relative-1 concerning his "religious training," "main
21 training," and other activities in ISIL controlled territory.

22 CC-1's May 2015 communications with Relative-1 over
23 Facebook stating his support of the treatment of an ISIL
24 prisoner.

25 CC-1's message to a Facebook friend stating "I live in

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1 bilad al Islam now the real bilad al Islam, and it's
2 beautiful."

3 And finally, CC-1's June 2015 private message to an
4 individual on Twitter that "life in Raqqa is normal for the
5 most part, when the K's are not bombing us." Paraphrasing now.
6 "It's a nice...I don't trust people here tbh I just got back on
7 Twitter after all these months. Training has been real busy."

8 In regards to CC-1's statements, the Court finds that
9 three of the four statements are admissible and will be allowed
10 at trial, assuming that all of the relevant foundational
11 elements are met. And they are CC-1's February 16, 2016,
12 message to Relative-1, his message to a Facebook friend stating
13 "I live in bilad al Islam," and his June 2015 private message
14 to an individual on social media regarding life in Raqqa.

15 The Court finds that these statements are admissible
16 as statements under penal interest under Rule 804(b)(3)
17 because, taken together, they tend to expose CC-1 to criminal
18 liability based on admissions of military training with ISIL.
19 And again, it is based on and will be subject to proper
20 authentication.

21 The Court finds that the statement concerning CC-1
22 May 2015 communication with a relative over Facebook concerning
23 ISIL's treatment of a prisoner is inadmissible. The statement
24 is inadmissible hearsay, and the government has not shown that
25 the statement qualifies as non-hearsay under Rule 804(b)(3). I

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1 also find that the statement is more prejudicial than not.

2 So those are the Court's findings with respect to
3 those four statements.

4 Moving now to the handwritten CC-1 so-called martyr
5 letter, Government Exhibit 1000.

6 The government seeks to introduce as evidence a
7 handwritten letter, Government Exhibit 1000, that an
8 unidentified individual sent electronically to a member of
9 CC-1's family, which CC-1 drafted while in ISIL controlled
10 territory, allegedly for the purpose of notifying his family in
11 the event of his death. The relative received the letter from
12 an unknown individual via Viber in November 2015. The creation
13 date of the letter is unknown.

14 With regards to this letter, subject again to the
15 government's proper authentication of the letter at trial, the
16 Court finds that most portions of Government Exhibit 1000
17 admissible, and certain portions are inadmissible as
18 essentially irrelevant.

19 The Court finds that portions of the letter are
20 statements by a co-conspirator under Rule 801(d)(2)(E). As the
21 Second Circuit noted in *Gigante*, the objective of the joint
22 venture need not be the crime charged in the indictment or the
23 objective of the conspiracy charged in the indictment. See
24 also *United States v. Lyles*, 593 F.2d 182. "However, the
25 conspiratorial objective being furthered by the declarant's

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1 statement must in fact be the objective of the conspiracy
2 between the defendant and the declarant." *U.S. v. Russo*, 302
3 F.3d 37.

4 As the Second Circuit has held, even where particular
5 crimes have already been committed, "the conspiracy does not
6 necessarily end; it continues until its aim has been achieved,
7 it has been abandoned, or otherwise terminated." *U.S. v.*
8 *Arrington*, 867 F.2d 122. Moreover, the fact that some of the
9 conspirators have been indicted or incarcerated does not
10 inevitably lead to the conclusion that the conspiracy has been
11 terminated. *U.S. v. Persico*, 832 F.2d 705.

12 The Court finds that the following portions of the
13 letter are non-hearsay under Rule 802(d)(2)(E):

14 The top portion of the letter identifying that it is a
15 letter to CC-1's brother. The statement on the first page that
16 reads "If you are reading this, then know that I've been killed
17 in battle and am now with our Lord Allah. The statement on the
18 first page that reads "I told you that day at the train
19 station, the last time I saw you...we will win this war one
20 day, this war between Iman and Kufi." (War between belief and
21 disbelief.) And the statement on the first through second
22 pages that reads "This is Allah's promise to the martyrs, and
23 know if I am accepted as a martyr, that Allah has not failed in
24 his promise."

25 These statements were made in furtherance of the

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1 conspiratorial objective of facilitating the fighting and
2 martyrdom of CC-1 on behalf of ISIL. The Court does not adopt
3 the defendant's approach that any conspiracy between the
4 parties ended when CC-1 joined ISIL. As long as the government
5 is able to establish the existence of a conspiracy, then this
6 evidence comes in at trial as a statement by a co-conspirator.
7 Additionally, the Court finds that the probative value of these
8 statements cannot be said to be substantially outweighed by any
9 unfair prejudice.

10 The Court finds that the remaining portions of the
11 letter, which focus generally on CC-1's love for his family,
12 religious passages, and general philosophical thoughts about
13 life after death, do not qualify as non-hearsay under either
14 the co-conspirator rule or the statements against penal
15 interest. These statements do not further the goal of any
16 conspiracy or subject CC-1 to any potential liability. Nor are
17 these statements against CC-1's penal interest. Nor does the
18 Court apply the residual hearsay exception to the remainder of
19 the letter.

20 The Court also rejects defendant's contention that the
21 letter constitutes hearsay within hearsay because the
22 photograph was transmitted via Viber social media.

23 I do note for the parties that the copy that the Court
24 has is a very poor copy. So please give us as good a copy as
25 you have, so we can identify specifically for you what portions

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1 of the letter are deemed admitted.

2 The next issue concerns CC-1's YouTube video and
3 related communications between CC-1 and CC-3.

4 The government seeks to introduce as evidence a
5 YouTube video depicting CC-1 in military attire in which CC-1
6 states, among other things, that he joined and was residing in
7 a territory controlled by ISIL; that no one, including the
8 defendant, had assisted or supported CC-1 in joining ISIL or
9 traveling to ISIL controlled territory. The government also
10 seeks to offer communications involving CC-1 and CC-2 leading
11 up to the creation of the video, including a conversation where
12 CC-2 told CC-1 that CC-2 spoke with the defendant, and the
13 defendant expressed that he wanted CC-1 to create the video.

14 The Court finds that the YouTube video is admissible,
15 and therefore grant's the government's motion in limine to
16 admit the video and denies the defendant's motion to exclude
17 the video.

18 To address defendant's argument that the beginning
19 portion of the video is offered for its truth is inadmissible
20 under *Crawford*, the lynchpin of the *Crawford* decision is its
21 distinction between testimonial and non-testimonial hearsay.
22 The rule announced in *Crawford* applies only to testimonial
23 statements. The Court finds that the portion of the video
24 offered for its truth is not testimonial. And the Court finds
25 that the video is not akin to extrajudicial statements

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1 contained in formalized materials, such as affidavits,
2 depositions, prior testimony, or confessions.

3 As to the remainder of the video, the video contains
4 statements by a co-conspirator made during and in furtherance
5 of the charged conspiracy because the video advances the
6 objects of the conspiracy, that is to say carrying out the plan
7 to provide material support to ISIL, as opposed to thwarting
8 its purpose. And in this case, the statements furthered the
9 purpose of the conspiracy between defendant and CC-1 because
10 the statements regarding defendant's lack of involvement with
11 CC-1 are being offered as allegedly false exculpatory
12 statements. As long as the government is able to establish the
13 existence of the conspiracy, then this evidence comes in at
14 trial as a statement by a co-conspirator.

15 Additionally, all of the statements in the video after
16 CC-1 identifies himself and states that he is in the Islamic
17 state are not being offered for the truth of the matter
18 asserted, but rather to show the alleged falsity of the
19 exculpatory statements.

20 As to the written communications about the creation of
21 the YouTube video, the Court finds them admissible as
22 statements by co-conspirators. Again, provided that the
23 government is able to establish the existence of the conspiracy
24 and the authenticity of the statements.

25 The government also moved at that time for a jury

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1 questionnaire. However, the Court has already determined we
2 will not be using a jury questionnaire, and accordingly, that
3 portion of the motion is moot.

4 Turning now to defendant's October 17 motion in
5 limine. The first part of that motion addressed the
6 government's evidence and the provision of final translation of
7 documents. I believe that all of these issues were decided at
8 the October 28 conference, and there should be nothing
9 remaining with respect to that. If there is, I will ask the
10 parties to bring that to my attention.

11 MR. HABIB: Does the Court want to hear us on that
12 right now?

13 THE COURT: Sure.

14 MR. HABIB: Okay. There are a few categories, one is
15 we -- as to exhibits, we have a draft exhibit list dated
16 October 3. It's not a final exhibit list, the government has
17 confirmed to us. So our first question would be when the
18 government will provide us with that.

19 As to translations, we were provided yesterday with
20 some additional videos that haven't been translated, so we
21 don't have final translations of those.

22 THE COURT: Are those on the exhibit list?

23 MR. HABIB: No.

24 THE COURT: Those videos?

25 MR. HABIB: I don't believe so. Links to those

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1 videos -- there are links to YouTube videos that are exchanged
2 via Facebook communication. The links may have been provided,
3 but the videos were not. And I simply, I can't recall off the
4 top of my head whether all of those links would have been
5 accessible from the Facebook production itself. But they have
6 not been specifically called out as videos that the government
7 intended to offer in evidence. So those videos in Arabic, for
8 the most part not translated.

9 Finally, we are aware the government has been
10 undertaking a review of some of its translations with a
11 different translator, so we'd simply ask whether the
12 translations thus far designated as final are in fact final or
13 whether they're subject to review. Those are the additional
14 evidentiary issues.

15 MR. QUIGLEY: Judge, I think taking those in reverse
16 order. We did notice an interpreter on October 3 consistent
17 with the Court's expert deadline. That person produced what we
18 represented and were told were final translations in early
19 November. We produced those to the defense. When we sat down
20 to prep with that person, right after Thanksgiving, I think it
21 was the week after Thanksgiving, she expressed some reservation
22 about having to testify in a public proceeding. There is no
23 other way to explain that. She was provided to us by the
24 translation company as an expert witness for this case. She
25 was the second translation witness that they had provided.

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1 They knew this was going to be a trial.

2 This is obviously -- we've expressed our displeasure
3 and concern about that to the contractor. We found another
4 interpreter, we noticed that person promptly. And he is
5 rereviewing the interpretations. We anticipate hopefully
6 having all that done by the end of this week, and we will be
7 producing that on a rolling basis.

8 THE COURT: So the fact that you now have another
9 expert has nothing to do with your questioning of the finality
10 of those translations, simply with a too timid interpreter.

11 MR. QUIGLEY: Exactly. I think the prep session, I
12 wasn't in it, but Ms. Tekeei was, I think five or 10 minutes.
13 And it was clear this person did not -- had concerns -- did not
14 understand the scope of the work she had been asked by the
15 translation company to undertake.

16 There is no other way around it, that's what it is,
17 we're not happy about it, but we're doing the best we can to
18 get everything refinalized. We provided expert notice promptly
19 as soon as we had the additional or the new person identified.
20 And he's been working round the clock.

21 THE COURT: The videos.

22 MR. QUIGLEY: The videos, Judge, the videos are links
23 that are contained mostly in the shared content portion of
24 Mr. El Gammal's Facebook. So these are essentially things
25 where Mr. El Gammal has said, look at this, you know, put it

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1 out to the world. The links are accessible in the -- for the
2 most part the links are accessible in the actual Facebook
3 return. That shared content is on the government's October 3
4 exhibit list. It's been the subject of some motion in limine
5 briefing.

6 We went back as the issues in trial crystalized, and
7 in part due to the motion in limine briefing and some of the
8 arguments that defense raised, and we identified a couple of
9 additional videos, there are a few additional videos that we
10 are able to download. We've provided those to the defense, and
11 again we have asked the translation company to finalize those
12 translations by the end of the week.

13 THE COURT: Was there a third category or was that it?

14 MR. HABIB: Maybe I can just seek clarification. When
15 will we have final translations of all of the government's
16 trial exhibits? Because we, as the Court I'm sure can
17 appreciate, want consultation with our expert as to the
18 accuracy of the translations. This is a case about words.

19 THE COURT: I understand. I understood Mr. Quigley to
20 say about the end of this week this second person will have
21 completed his review.

22 MR. QUIGLEY: That's the timeline we've given him,
23 your Honor. We've emphasized that he needs to make that. By
24 the weekend at the latest.

25 MR. HABIB: Okay.

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1 THE COURT: Secondly, with respect to the defendant's
2 motions, they make a general objection to the admission of all
3 statements of Mr. El Gammal, as they don't know at this time
4 what exact statements will be used, including specific
5 objections to the use of Mr. El Gammal's calls from prison and
6 his statements regarding ISIL.

7 With respect to the jail calls, at this time the
8 government has represented it does not intend to offer any of
9 the defendant's jail calls, but reserves the right to do so
10 depending, among other things, on the defense arguments at
11 trial. Accordingly, there is nothing for me to decide at this
12 time. I will, if things develop otherwise, make a decision at
13 the appropriate time.

14 With regards to his statements concerning ISIL, the
15 defense argues that the government's draft exhibit list
16 contains several statements in which Mr. El Gammal communicates
17 his views about ISIL and Middle Eastern politics in general
18 terms in public Facebook posts and with persons not alleged to
19 be co-conspirators. These include an April 25, 2014 Facebook
20 message to an individual in which he says "I was never with the
21 Free Syrian Army. I was with Jabhat al Nusra and at the time
22 with the state."

23 Secondly, a July 1, 2014 Facebook conversation with an
24 individual in which he states "If Daesh gets to Egypt, I will
25 join them there" and it goes on "I hope they get to the Egypt,

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1 I am willing to live in a tent under an Islamic State instead
2 of all luxuries under an infidel state."

3 Third, a July 5, 2014 Facebook post regarding the
4 "Islamic Caliphate" which defense objects as unduly
5 prejudicial.

6 Fourth, a September 13, 2014 Facebook post linking a
7 newspaper article entitled "Egypt Issues Stamps to Mark New
8 Suez Canal" but apparently mistakenly uses pictures of the
9 Panama Canal. Defendant states this post is irrelevant.

10 Fifth, a July 15 to July 16 Facebook conversation from
11 defendant regarding pro-Israel bias. Defendant objects as
12 unduly prejudicial.

13 With respect to the general argument, defendant moves
14 to preclude these and similar statements regarding Mr. El
15 Gammal's belief about ISIL and Middle Eastern politics in
16 general made to persons not involved in the charged conspiracy.

17 The First Amendment protects the right to free speech
18 and association. In *Holder v. Humanitarian Law Project*, the
19 Supreme Court held that 18 U.S.C. Section 2339B does not
20 penalize mere association with a foreign terrorist organization
21 and does not prohibit being a member of one of the designated
22 groups or vigorously promoting and supporting the political
23 goals of that group. Under the material support statute,
24 persons may say anything they wish on any topic, and may speak
25 and write freely about designated foreign terrorist

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1 organizations. Section 2339B does not prohibit independent
2 advocacy or expression of any kind, and does not prevent
3 persons from becoming members of foreign terrorist
4 organizations or impose a sanction on them for doing so.

5 The defendant has raised concerns that it does not
6 know which of the defendant's statements the government will
7 seek to introduce at trial, and makes a general objection to
8 the admission of all defendant's statements.

9 The Court denies defendant's broad objection to the
10 admissibility of all statements made by him. The Court will
11 not categorically exclude all statements made by the defendant,
12 but must look instead to the specific statement and relevant
13 context for any evidentiary ruling. The Court further notes
14 that statements made by the defendant qualify as non-hearsay
15 under Rule 801(d)(2)(A), as they are statements by a party
16 opponent. To the extent the government introduces statements
17 at trial other than the specific statements the Court rules
18 upon here, the defendant is free to object on other bases other
19 than hearsay, such as relevance, if he so desires.

20 Again, the government has indicated that it does not
21 seek to offer any of his jail calls.

22 As to the specific statements raised by the defendant,
23 the Court rules that the following statements by the defendant
24 are admissible as statements by a party opponent and rejects
25 the defendant's additional objections regarding their

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1 admissibility.

2 First, defendant's April 25, 2014 Facebook statement
3 regarding the Free Syrian Army.

4 Second, defendant's July 1, 2014, Facebook statement
5 regarding the Islamic State in Egypt.

6 Third, the defendant's July 5, 2014 Facebook post
7 regarding the Islamic Caliphate.

8 Next, July 15 to July 16, 2014 Facebook statements
9 from the defendant. The Court finds that this conversation is
10 admissible in part. In its briefing, the government indicated
11 it is amenable to discussing with the defense redactions to the
12 identified statements regarding pro-Israel bias in American
13 media. The parties are directed to meet and confer on
14 redactions regarding that portion of the conversation.

15 The remainder of defendant's July 16 Facebook
16 statements discussing topics such as, for example, ISIL, Abu
17 Bakr al-Baghdadi, the Muslim Brotherhood fighting the
18 mujahideen and defendant's statement "I support the jihad" are
19 admissible.

20 And finally, defendant's August 10, 2015 statement
21 regarding his jihadi personality and jihad against the
22 military.

23 Further, the Court finds the following specific
24 statement by defendant inadmissible on the basis of relevance:
25 The September 13 Facebook post linking to a newspaper article

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1 entitled "Egypt Issues Stamps to Mark the New Suez Canal."

2 Next we turn to defendant's objections concerning
3 third-party statements. Defendant objects to --

4 MR. HABIB: Your Honor, I apologize just very briefly.

5 THE COURT: Sure.

6 MR. HABIB: On that point. On the third of those
7 statements, a July 5 post regarding the Islamic Caliphate, I
8 would respectfully request that the Court withdraw its ruling
9 on that point and reserve decision, as we've included some
10 additional briefing on that exhibit in our December 9 motions
11 in limine.

12 Specifically, we are objecting on the ground that the
13 post was not in fact made by Mr. El Gammal. It was made by
14 another individual who, in the parlance of Facebook, tagged
15 Mr. El Gammal in that post. That is to say, the other
16 individual, not Mr. Gammal, is responsible for the post.

17 I'm happy to speak at more length now, but I think in
18 light of the fact that we've briefed it and the government has
19 an opportunity to respond, I would ask the Court to withdraw
20 the ruling on that exhibit.

21 THE COURT: Okay. I will do that. I will reserve
22 decision and wait to hear the government on further on it.

23 MR. QUIGLEY: We'll respond Friday, your Honor, with
24 the schedule.

25 THE COURT: Okay. We are on third-party statements.

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1 So, more narrowly Mr. El Gammal seeks to preclude the
2 following specific third-party statements: CC-1 messages from
3 Mr. Tarek from August 14, 2014; CC-1 video sent from CC-2 to
4 Marwa El Gammal; the letter from CC-1 to his family; and
5 finally, Government Exhibit 301, the contents of CC-1's second
6 Twitter account under a particular handle.

7 Concerning the August 14, 2014 message between CC-1
8 and Mr. Tarek, the Court finds that these statements are
9 admissible not for the truth of the matter asserted, but for
10 the effect on the listener, CC-1. However, the Court will
11 grant defendant's alternative request that the jury be
12 instructed at the time that the statement is received that
13 there is no evidence that the defendant made the comments
14 described in this conversation. And the evidence shall not be
15 admitted for the truth of the matter asserted, but rather for
16 the effect on the listener, CC-1. And I will look to the
17 defense in the first instance to provide appropriate language
18 for the jury instruction.

19 As to the CC-1's Twitter account, the Court has
20 previously held that CC-1's June 2015 private message to an
21 individual on Twitter regarding life in Raqqa and the
22 mujahideen is admissible. Additionally, the Court finds that
23 the additional Twitter statements offered by the government on
24 page 31 of its opposition that (1) training has been real busy;
25 (2) the statements regarding the Baraka in Sham; and (3) the

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1 statement that it's one thing not to support us, but do not
2 allow yourself to become a mouthpiece for the Kuffar who are
3 fighting us, are also admissible as statements against penal
4 interest under Federal Rule of Evidence 804(b)(3), because they
5 could be used to show the receipt of military-type training
6 from ISIL and expose CC-1 to liability. The Court in this
7 regard rejects defendant's argument that CC-1's statements
8 could not expose him to liability because he was physically
9 outside the reach of the United States at the time.

10 So I think that resolves the defendant's motions in
11 limine.

12 Now turning to the motions to exclude the government's
13 Rule 404(b) evidence. The government seeks to admit four
14 categories. The defendant's and CC-1's receipt of the book
15 *Milestones* by Sayid Qutb, (b) defendant's statements regarding
16 Anwar al-Awlaki, (c) the defendant's and CC-2's discussion of
17 military action in Egypt, and (d) the defendant's statement to
18 CC-2 regarding Egypt and an AK-47 that are admissible both as
19 direct proofs of the charge and as background to the charged
20 conspiracies. In the alternative, the government argues that
21 this evidence is also admissible in the government's case in
22 chief pursuant to Rule 404(b) as proof of the defendant's
23 motive, intent, preparation, plan, knowledge, identity, and/or
24 absence of mistake or accident with respect to the charges.
25 That it is evidence of how the relationship between the

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1 defendant and his co-conspirators evolved, and because it makes
2 the story of the crimes charged complete and the charged
3 conduct more plausible.

4 With respect to the receipt of the book *Milestones*,
5 the defense argues this is pure propensity evidence, and the
6 government wants to call the author of the book a jihadi and
7 lump defendant with him. As to the evidence regarding the book
8 *Milestones*, the Court grants defendant's motion to exclude
9 reference to the defendant and CC-1's receipt of the book and
10 finds this evidence inadmissible. The Court agrees with
11 defendant that there is no relationship between receiving the
12 book, in the case of the defendant five years before the
13 conspiracy that's charged, and participating in a conspiracy to
14 provide material support to a terrorist organization. Nor is
15 the evidence admissible to prove motive.

16 The Court further rejects the government's argument
17 that this evidence is admissible under a separate basis under
18 Rule 404(b) because it explains how the conspiracy relationship
19 developed.

20 Concerning the defendant's statements regarding Anwar
21 al-Awlaki, the government seeks to introduce defendant's
22 August 2014 statements to the effect that Anwar al-Awlaki was
23 really committed to the cause...and his words apply today, as
24 well as the defendant's statements that he uploaded videos of
25 al-Awlaki's lectures to YouTube.

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1 With regards to the defendant's statements regarding
2 Mr. al-Awlaki, defendant disputes the accuracy of the
3 government's translation. The Court therefore defers ruling on
4 this motion in limine.

5 As to the video uploads, the Court grants defendant's
6 motion to exclude defendant's statement that he uploaded videos
7 of al-Awlaki's lectures to YouTube. The Court agrees with
8 defendant that without evidence of the specific content of the
9 videos El Gammal is alleged to have uploaded, the government
10 cannot prove a relationship between those videos and one of the
11 permitted purposes under Rule 404(b)(2).

12 Turning, finally, to defendant's and CC-2's discussion
13 of military action and the defendant's statement to CC-2
14 regarding an AK-47, the government claims that in January of
15 2014 the defendant exchanged Facebook messages with CC-2
16 regarding planning military action in Egypt. He later wrote he
17 wished he could be in Egypt with an AK-47 and four magazines.
18 One minute later the defendant and CC-2 exchanged messages that
19 stated that CC-2 wanted to travel to Turkey and defendant
20 stated that CC-2 was a Daesh gigolo.

21 As to defendant CC-2 statements regarding military
22 action in Egypt, the Court finds this evidence inadmissible
23 because the exchange does not constitute direct evidence of a
24 conspiracy to support ISIL and the statements do not qualify
25 for any exceptions to Rule 404(b).

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1 As to defendant's July 1, 2014 statements to CC-2
2 regarding his desire to bring an AK-47 and four magazines to
3 Egypt, and the conversations between CC-2 and the defendant
4 regarding travel, the Court finds this evidence admissible.
5 The Court agrees with the government that the statements, taken
6 together, are direct evidence of the charged conspiracy because
7 they demonstrate defendant's familiarity with military weapons,
8 CC-2's support for ISIL, and Turkey's status as a destination
9 for those who want to join ISIL.

10 So that constitutes the Court's decision on those
11 issues. I do note that there is currently pending the parties'
12 second motions in limine, opposition to which are currently due
13 on December 23, 2016.

14 Unless there is anything more, I believe we are done
15 for today, except I do want to inquire as to the parties'
16 availability over the next two weeks for further opinions which
17 I expect to provide from the bench. As long as folks are going
18 to be around.

19 MR. QUIGLEY: Judge, I think we'll have at least one
20 person, if not two, from the government here at all times.

21 MR. HABIB: We'll also have someone here, your Honor,
22 at least one person.

23 THE COURT: Okay.

24 MS. SHROFF: One is out, one's coming back. We're
25 taking turns.

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1 MR. HABIB: If the Court wants to hear argument as
2 opposed to simply ruling from the bench --

3 THE COURT: I will let you know in advance if there is
4 any particular issue as to which I will want to hear further
5 argument. Okay? Anything further?

6 MS. SHROFF: Can we just have one second?

7 THE COURT: Sure.

8 (Pause)

9 MS. SHROFF: Your Honor, we have one issue to raise
10 but we would like to raise it ex parte with the Court. It will
11 be brief.

12 THE COURT: Certainly. Do we need Mr. El Gammal to
13 remain?

14 MS. SHROFF: He does not need to accompany us.

15 THE COURT: So can I excuse him with the marshals?

16 THE DEFENDANT: Okay.

17 MS. SHROFF: That's fine, your Honor. I will update
18 Mr. Gammal.

19 THE COURT: Very well.

20 (Pages 64-65 sealed)

21 (Continued on next page)

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1 (In open court)

2 THE COURT: Unless there is anything else?

3 MR. QUIGLEY: Not from the government, your Honor.

4 Thank you.

5 MS. SHROFF: No, your Honor. Thank you.

6 THE COURT: We are adjourned. Thank you, folks.

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